Guideline Sentencing Update

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Departures

Mitigating Circumstances

Ninth Circuit holds that departure is warranted for "sentencing entrapment." Defendant was the target of a sting operation in which a confidential informant and undercover agent induced him to sell 10,000 doses of LSD. The evidence indicated that defendant had never engaged in a drug deal anywhere near this size and that he was pressured into selling more than the 5,000 doses he was willing to sell, but the jury rejected defendant's entrapment defense. The district court expressed dissatisfaction with the guideline minimum of 151 months but concluded it had no ground for departure.

The appellate court reversed, holding that under these circumstances a departure for sentencing entrapment, or "sentence factor manipulation," would be proper. The Guidelines were amended after defendant's sentencing to allow the possibility of departure in a reverse sting, *see* §2D1.1, comment. (n.17) (Nov. 1993). Although this was not a reverse sting, the court concluded that the amendment "shows that the Sentencing Commission is aware of the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard for his predisposition, his capacity to commit the crime on his own, and the extent of his culpability. Our conclusion that a finding of sentencing entrapment is warranted in the instant case is motivated by the same concerns, and, as such, is fully consistent both with the Amendment and with the sentencing factors prescribed by Congress."

"In this case, Judge Ideman found that Staufer was a user and sometime seller of LSD, but that he sold only to personal friends and had never engaged in a deal even approaching the magnitude of the transaction for which he was convicted. The court recognized that . . . he was not predisposed 'to involve himself in what turned out to be, from the standpoint of the Sentencing Guidelines, an immense amount of drugs.' We are persuaded that 'sentencing entrapment may be legally relied upon to depart under the Sentencing Guidelines,' . . . and, based on the district court's findings, we conclude that Staufer was so entrapped in this case."

U.S. v. Staufer, 38 F.3d 1103, 1107–08 (9th Cir 1994) (Beezer, J., dissenting).

See *Outline* at VI.C.4.c.

Sixth Circuit rejects downward departure for white-collar defendant's community ties and charitable deeds. Defendant and others were indicted on 33 counts relating to the sale of adulterated orange juice. He pled guilty to one count and faced a sentence of 30–37 months. Based on "a substantial number of letters" praising defendant, the district court found that defendant's "community ties, civic and charitable deeds, and prior good works merited a substantial downward departure" and sentenced defendant to 12 months of home confinement and a $250,000 fine.

The appellate court remanded, holding that "it is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as Crouse, to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts. . . . [T]he Sentencing Guidelines already considered the nature of white-collar crime and criminals when setting the offense levels that govern this offense. Furthermore, the Guidelines reward defendants who have lived previously lawful lives by setting substantially lower sentencing ranges for them than those suggested for past offenders. . . . The record shows that Crouse has performed many fine deeds in his life and has won the devotion and admiration of people whom he has helped and who have honored him with positions of community leadership. However, he also has derived well over $1 million in income from . . . the adulteration scheme."

U.S. v. Kohlbach, 38 F.3d 832, 838–39 (6th Cir 1994).

See *Outline* at VI.C.1.a.

First Circuit rejects departure based on comparison of defendant's charitable work and community service to that of "the typical bank robber." Defendant was convicted of several counts relating to a bank robbery. The district court departed under §5H1.11 because defendant's "charitable work and community service stood apart from what one would expect of 'the typical bank robber.'" The court noted that "[i]f this was a securities fraud case or bank fraud case, probably the downward departure would not be appropriate."

The appellate court remanded, noting at the outset that "a defendant's record of charitable work and community service falls into the discouraged-feature category of justifications for departure."

Therefore "departure is warranted only if the 'nature and magnitude' of the feature's presence is unusual or special," and "a court must ask 'whether the case differs from the ordinary case in which those [discouraged] features are present.'" Here, the district court "did not compare Bonasia's history of charitable and community service to the histories of defendants from other cases who similarly had commendable community service records. . . . [T]he court erred by restricting the scope of its comparison to only bank robbery cases. A court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd."

U.S. v. DeMasi, – F.3d – (1st Cir. Oct. 26, 1994).

See *Outline* at VI.C.1.a.

Seventh Circuit holds departure for family responsibilitiesmay be allowed in extraordinary cases. The district court was inclined to depart for defendant's family responsibilities but concluded that *U.S. v. Thomas*, 930 F.2d 526 (7th Cir. 1991) (*Thomas I*), prohibited it. The appellate court remanded. "Because our sister circuits have uniformly rejected *Thomas I*'s interpretation of section 5H1.6 both before and after the November 1, 1991 amendment, and because that amendment omits the language on which *Thomas I* specifically relied, we hold today that a district court may depart from an applicable guideline range once it finds that a defendant's family ties and responsibilities or community ties are so unusual that they may be characterized as extraordinary. Any other reading would be inconsistent with the plain language of section 5H1.6 in that it would render meaningless the Commission's use of the phrase 'not ordinarily relevant.'"

U.S. v. Canoy, 38 F.3d 893, 906 (7th Cir 1994).

See *Outline* at VI.C.1.a.

Tenth Circuit holds prison overcrowding cannot be basis for downward departure. Among other reasons, the district court justified a downward departure on the basis of prison overcrowding after finding that federal prisons are operating at 148% ofcapacity. The appellate court reversed. "In [28 U.S.C. §] 994(g), Congress directed the Sentencing Commission, not the courts, to consider prison capacities.While the Commission is directed to take into account prison overcrowding in devising its overall guideline scheme, prison capacity is not an appropriate consideration for courts in determining the sentences of individual defendants."

U.S. v. Ziegler, 39 F.3d 1058, 1063 (10th Cir. 1994).

See *Outline* generally at VI.C.5.b.

Substantial Assistance

Eleventh Circuit holds that where district court accepted plea agreement that obligated government to move for Rule 35(b) reduction, it may not reject the motion without hearing evidence. Defendant's plea agreement effectively obligated the government to file a Rule 35(b) motion if it determined that his post-sentence cooperation warranted an additional reduction in sentence. Eventually the government did file a motion, with a request for an evidentiary hearing, but the evidence of defendant's cooperation was not set forth in the motion for security reasons. The district court denied the motion and defendant appealed.

The appellate court allowed the appeal, finding that "if the motion is made pursuant to a plea agreement, the rights of the defendant are implicated by the district court's refusal to hear evidence of a defendant's substantial assistance. If the defendant were not permitted to appeal, he or she would be effectively without recourse to enforce a breached plea agreement." The court then remanded for an evidentiary hearing, holding that in these circumstances the refusal to grant a hearing had "effectively prevented the government from presenting its Rule 35 motion [and] forced a breach of the plea agreement." The court noted that the need for a hearing arose from the particular facts of this case and that "[i]n some instances a written motion outlining the defendant's cooperation may suffice to satisfy the plea agreement."

U.S. v. Hernandez, 34 F.3d 998, 1000–01 & n.6 (11th Cir. 1994).

See *Outline* at VI.F.4.

Aggravating Circumstances

Ninth Circuit reverses departure based on "the danger of violence associated with a fraudulent drug sale." Defendant pled guilty to distribution of cocaine, possession of cocaine with intent to distribute, and to carrying a firearm in connection with a drug trafficking crime under 18 U.S.C. §924(c). Because he was attempting to cheat the buyers (who were really undercover agents), he sold much less than the negotiated amount—only about 25 grams of cocaine was contained in three kilogram-sized bricks. With only 25 grams of cocaine actually involved, defendant's guideline maximum was 16 months. However, the district court held that departure was warranted because of a greater likelihood of violence during an attempted drug fraud than in an "honest" drug sale. Defendant was sentenced to 25 months, plus the mandatory consecutive 60-month sentence on the firearm charge.

The appellate court reversed, concluding that the risk of violence was accounted for by the §924(c) conviction. "Possession of a gun . . . is dangerous precisely—and only—because it may be used when one drug trafficker tries to cheat or rob another or when law enforcement officials try to apprehend a drug trafficker. . . . The fact that an attempted fraud occurs in any given transaction adds little, if anything, to the risk already reflected in section 924's mandatory sentencing provisions. . . . Because that danger is taken into account in the mandatory consecutive sentence under section 924(c)(1), it should not also be reflected in Zamora's sentence on the distribution charge." The court noted that it expressed no view whether departure would be warranted in a similar case where the defendant was not also subject to a sentence under §924(c)(1).

U.S. v. Zamora, 37 F.3d 531, 533–34 (9th Cir 1994) (Rymer, J., dissenting).

See *Outline* generally at VI.B.2.a.

Criminal History

Third Circuit holds that downward departure for career offender may include departure by offense level as well as criminal history category. The district court held that career offender status overstated defendant's criminal history and departed under §4A1.3 by lowering defendant's criminal history category, but concluded that it could not also lower defendant's offense level. The appellate court remanded: "Because career offender status enhances both a defendant's criminal history category and offense level, . . . a sentencing court may depart in both under the proper circumstances."

U.S. v. Shoupe, 35 F.3d 835, 837–38 (3d Cir 1994) (Alito, J., dissenting).

See *Outline* at VI.A.3.a.

Offense Conduct

Calculating Weight of Drugs

Third Circuit holds that government bears ultimate burden of proof on intent and capability regarding negotiated amounts. For the calculation of negotiated drug amounts under §2D1.1, comment. (n.12), the appellate court agreed with the circuits that have held that once the government meets its initial burden of proving the amount under negotiation, defendant then has the burden of showing lack of both intent and reasonable capability. However, the ultimate burden of persuasion "remains at all times with the government. Thus, if a defendant puts at issue his or her intent and reasonable capability to produce the negotiated amount of drugs by introducing new evidence or casting the government's evidence in a different light, the government then must prove either that the defendant intended to produce the negotiated amount of drugs or that he or she was reasonably capable of doing so." The court concluded that "it is more reasonable to read Note 12, in its entirety, as addressing how a defendant's base offense level may be determined in the first instance when a drug transaction remains unconsummated, for it is important to bear in mind that calculating the amount of drugs involved in criminal activity neither aggravates nor mitigates a defendant's sentence; rather, it provides the starting point." The court added that "a district court must make explicit findings as to intent and capability."

U.S. v. Raven, 39 F.3d 428, 434–37 (3d Cir 1994).

See *Outline* at II.B.4.a.

Drug Quantity—Relevant Conduct

Fifth Circuit holds that amended guideline method for calculating weight of LSD does not apply retroactively to mandatory minimum calculation. Defendant sought resentencing after the method of calculating LSD quantities under the Guidelines was amended and made retroactive. The district court denied the motion, holding that the amendment could not be applied retroactively because defendant was subject to a 10-year statutory minimum sentence.

The appellate court affirmed. "We conclude that the district court's ruling is correct based on a logical reading of the policy statement to §2D1.1(c). This policy statement provides that the new approach to calculating the amount of LSD 'does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b)).' U.S.S.G. §2D1.1, comment. (backg'd). The *Chapman* citation refers to *Chapman v. U.S.*, 500 U.S. 453 . . . (1991), in which the Supreme Court held that the term 'mixture or substance' in 21 U.S.C. §841(b) required the weight of the carrier medium for LSD to be included for purposes of determining the mandatory minimum sentence. . . . A common sense interpretation of this policy statement leads to the inescapable conclusion that the mandatory minimum of §841, calculated according to *Chapman*, overrides the retroactive application of the new guideline."

U.S. v. Pardue, 36 F.3d 429, 431 (5th Cir 1994) (per curiam). *Accord U.S. v. Mueller*, 27 F.3d 494, 496–97 (10th Cir. 1994); *U.S. v. Boot*, 25 F.3d 52, 54–55 (1st Cir. 1994). *Contra U.S. v. Stoneking*, 34 F.3d 651, 652–55 (8th Cir. 1994) [7 *GSU* #3].

See *Outline* at I.E, II.A.3, and II.B.1.

Adjustments

Obstruction of Justice

Ninth Circuit affirms there was sufficient nexus between crime of conviction and reckless endangerment. Defendant committed an armed bank robbery. He abandoned his stolen getaway car on the same day, then four days later carjacked a taxicab. Local sheriffs were alerted after the carjacking and tried to capture defendant, who led them on a 30-minute chase, drove straight at a police car, and caused another police car to crash. The district court imposed a §3C1.2 enhancement for reckless endangerment during flight, finding that the car chase was part of the effort to avoid apprehension for the bank robbery as well as the carjacking. Defendant appealed, claiming there was no "nexus" between the bank robbery—the offense of conviction—and his reckless behavior. Because the government did not challenge the assertion that §3C1.2 requires such a nexus, the appellate court "assume[d] without so holding" that a nexus is required. The court affirmed.

"A sufficient nexus exists to warrant enhancement under U.S.S.G. §3C1.2 if a substantial cause for the defendant's reckless escape attempt was to avoid detection for the crime of conviction. In applying the nexus test, we look to the state of mind of the defendant when he recklessly attempted to avoid capture, not to why the police were pursuing him. The factors of geographic and temporal proximity give some indication of causation, but are not controlling determinates, particularly when the defendant's state of mind is established. On the day of his escape attempt and capture, Duran informed an agricultural worker that he had stolen a taxicab and robbed a bank. Thus, one of the reasons he initiated the dangerous car chase was the bank robbery. The district court found the car chase was 'in efforts to avoid apprehension due to his commission of the bank robbery, as well as stealing the motor vehicle.' The district court's findings are not clearly erroneous. There was sufficient nexus between the bank robbery and the car chase."

U.S. v. Duran, 37 F.3d 557, 559–60 (9th Cir 1994).

See *Outline* at III.C.3.

Supervised Release

Revocation of Supervised Release

Fifth Circuit holds that need for rehabilitation may be considered in setting sentence after revocation. Defendant's three-year term of supervised release was revoked for drug possession under 18 U.S.C. §3583(g). He was thus subject to a minimum term of one year in prison, and the district court determined the maximum sentence allowed under §3583(e)(3) was two years. The court imposed the maximum, citing defendant's need for drug rehabilitation as a reason for the length of the sentence.

The appellate court affirmed. "We now hold that the language of 18 U.S.C. §3583(g), and the purposes and intent behind the statute, is best served by permitting a district judge to consider a defendant's need for rehabilitation in arriving at a specific sentence of imprisonment upon revocation of supervised release. While we do not decide whether rehabilitative needs can be used to determine whether to *impose* imprisonment as an initial matter, once imprisonment is mandated by 18 U.S.C. §3583(g) rehabilitative needs may be considered to determine the length of incarceration within the sentencing range."

U.S. v. Giddings, 37 F.3d 1091, 1096–97 (5th Cir 1994).

See *Outline* at VII.B.1 and 2.

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Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003